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# Yong Kok Yeap v Precious Concrete Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(IM)(NCvC)-1739–10 OF 2023
SEE MEE CHUN, AZIMAH OMAR AND AZMI ARIFFIN JJCA
22 OCTOBER 2024

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*Civil Procedure — Summary judgment — Appeal — Plaintiff and company entered into contract for supply of ready-mixed concrete — Company failed to make payment under contract — High Court allowed plaintiff's summary judgment application against guarantor of company — Whether plaintiff satisfied contractual obligation to supply ready-mixed concrete to company — Whether guarantor liable to pay outstanding sum owed by company to plaintiff — Whether there was triable issue on execution of guarantee — Whether plaintiff had exhausted all legal remedy against company before commencing action against guarantor — Whether triable issue established — Whether there was misdirection by judicial commissioner warranting appellate intervention — Rules of Court 2012 O 14*

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Precious Concrete Sdn Bhd ('the plaintiff') had entered into a contract to supply ready-mixed concrete to MKP Builders Sdn Bhd ('MKP') for a construction project ('the said contract'). Pursuant to the said contract, the defendant as the director of MKP had executed a joint and several guarantee ('the said guarantee') duly witnessed by one Nurashikin bt Kamarudin. The plaintiff had satisfied its contractual obligation and had issued delivery notes between 28 September 2018 until 14 April 2019 that were duly signed and acknowledged by the authorised personnel of MKP, but MKP failed to make the relevant payments amounting to RM3,223,503.56. Upon initiating a legal action against MKP, the plaintiff discovered that MKP had been wound up. This prompted the plaintiff to file proof of debt to the official receiver of the department of insolvency. The plaintiff then filed an application for summary judgment under O 14 of the Rules of Court 2012 against the defendant as the director of MKP. In opposing the application, the defendant argued that: (a) the plaintiff did not establish their claim against MKP which was the contracting party, as such, the plaintiff could not in law, pursue its claim against the guarantor; (b) the plaintiff could not enforce a claim for alleged goods sold and delivered premise on an alleged guarantee agreement; (c) the plaintiff did not have a cause of action against the defendant for the sale and supply of goods as there was no contractual nexus between the plaintiff and the defendant; and (d) the plaintiff's cause of action against the defendant for an alleged breach of a guarantee was pre-mature given that there was no liability established against

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MKP. The High Court allowed the plaintiff's application for summary judgment, hence, the present appeal.

**Held**, dismissing the appeal with costs of RM10,000 to the plaintiff subject to allocatur fees:

(1) Based on the salient terms of the said guarantee, it was clear that there existed a contractual relationship between the plaintiff and MKP. In pursuant to the breach of contract by MKP, the defendant as the guarantor and principal of the said contract was liable to pay the outstanding sum due and payable to the plaintiff. The defendant had never denied the existence of the said guarantee which he understood the content and effect of it and proceeded to sign the guarantee himself which bound him to be jointly and severally liable as the guarantor and principal for the said contract to pay on demand all monies, interest and liabilities together with the interest owing by MKP to the plaintiff. This, therefore created the obligation on the defendant (see paras 28–31).

(2) The triable issue raised on the execution of the guarantee had no merit where the defendant confirmed he signed it and there was no allegation of fraud or forgery (see para 32).

(3) The court found that the defendant had never denied that the plaintiff had satisfied its contractual obligation under the said contract to supply the ready-mixed concrete to MKP which was strongly supported by the issuance of delivery notes between 28 September 2018 until 14 April 2019 that duly signed and acknowledged by the authorised personnel of the defendant's company. Further, the plaintiff had exhausted all legal remedy against MKP before commencing the main suit against the defendant (see paras 34–35).

(4) Based on the established and entrenched legal principles, the relevant provision of the law, the appeal records, written and oral submissions of parties, and the grounds of judgment by the learned judicial commissioner, the court found no misdirection on the part of the learned judicial commissioner to warrant the court to exercise its powers to interfere with the findings of the court below (see para 26).

**[Bahasa Malaysia summary**

Precious Concrete Sdn Bhd ('plaintif') telah menandatangani kontrak untuk membekalkan konkrit siap bancuh kepada MKP Builders Sdn Bhd ('MKP') untuk satu projek pembinaan ('kontrak tersebut'). Rentetan kontrak tersebut, defendan sebagai pengarah MKP telah menandatangani jaminan bersama dan berasingan ('jaminan tersebut') dengan disaksikan oleh Nurashikin bt Kamarudin. Plaintif telah memenuhi obligasi kontraknya dan telah mengeluarkan nota serahan antara 28 September 2018 hingga 14 April 2019 yang telah ditandatangani dan diakui dengan sewajarnya oleh kakitangan

MKP yang diberi kuasa, tetapi MKP gagal membuat bayaran yang berkaitan berjumlah RM3,223,503.56. Apabila plaintif memulakan tindakan undang-undang terhadap MKP, plaintif mendapati bahawa MKP telah digulung. Ini mendorong plaintif untuk memfailkan bukti hutang kepada penerima rasmi jabatan insolvensi. Plaintif kemudiannya memfailkan permohonan untuk penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah 2012 terhadap defendan sebagai pengarah MKP. Dalam menentang permohonan tersebut, defendan berhujah bahawa: (a) plaintif tidak membuktikan tuntutan mereka terhadap MKP yang merupakan pihak yang berkontrak, oleh itu, plaintif tidak boleh di sisi undang-undang, meneruskan tuntutannya terhadap penjamin; (b) plaintif tidak boleh menguatkuasakan tuntutan bagi barang yang dikatakan dijual dan diserahkan berdasarkan suatu perjanjian jaminan; (c) plaintif tidak mempunyai kausa tindakan terhadap defendan bagi penjualan dan pembekalan barang kerana tiada perhubungan kontrak antara plaintif dan defendan; dan (d) kausa tindakan plaintif terhadap defendan atas dakwaan kemungkiran jaminan adalah pra-matang memandangkan tiada liabiliti dibuktikan terhadap MKP. Mahkamah Tinggi membenarkan permohonan plaintif untuk penghakiman terus, justeru, rayuan semasa.

**Diputuskan**, menolak rayuan dengan kos RM10,000 kepada plaintif tertakluk kepada bayaran alokatur:

(1) Berdasarkan terma-terma penting jaminan tersebut, adalah jelas bahawa wujud hubungan kontrak antara plaintif dan MKP. Selaras dengan pelanggaran kontrak oleh MKP, defendan sebagai penjamin dan prinsipal kontrak tersebut bertanggungjawab untuk membayar jumlah tertunggak yang terhutang dan perlu dibayar kepada plaintif. Defendan tidak pernah menafikan kewujudan jaminan tersebut yang mana dia memahami kandungan dan kesannya dan dia sendiri terus menandatangani jaminan tersebut yang mengikatnya untuk bertanggungjawab secara bersama dan berasingan sebagai penjamin dan prinsipal bagi kontrak tersebut untuk membayar atas permintaan semua wang, faedah dan liabiliti bersama dengan faedah yang terhutang oleh MKP kepada plaintif. Justeru itu, ini mewujudkan kewajipan ke atas defendan (lihat perenggan 28–31).

(2) Isu yang boleh dibicarakan yang dibangkitkan mengenai pemeteraian jaminan tersebut tidak mempunyai merit memandangkan defendan mengesahkan dia menandatangani jaminan tersebut dan tiada dakwaan fraud atau pemalsuan (lihat perenggan 32).

(3) Mahkamah mendapati defendan tidak pernah menafikan plaintif telah memenuhi obligasi kontraknya di bawah kontrak tersebut untuk membekalkan konkrit siap bancuh kepada MKP yang disokong kuat dengan pengeluaran nota serahan antara 28 September 2018 sehingga

14 April 2019 yang ditandatangani dan diakui dengan sewajarnya oleh kakitangan syarikat defendan yang diberi kuasa. Selain itu, plaintif juga telah menghabiskan semua remedi undang-undang terhadap MKP sebelum memulakan saman utama terhadap defendan (lihat perenggan 34–35).

(4) Berdasarkan prinsip undang-undang yang telah mantap dan ditetapkan, peruntukan undang-undang yang berkaitan, rekod rayuan, penghujahan bertulis dan lisan pihak-pihak, dan alasan penghakiman oleh pesuruhjaya kehakiman yang bijaksana, mahkamah tidak mendapati apa-apa salah arah di pihak pesuruhjaya kehakiman yang bijaksana untuk membolehkan mahkamah menjalankan kuasanya untuk mengganggu keputusan mahkamah bawahan (lihat perenggan 26).]

**Cases referred to**

*Andrew Lee Siew Ling v United Overseas Bank (M) Bhd* [2013] 1 MLJ 449, FC (refd)

*Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, SC (refd)

*Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685, FC (refd)

*National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300, FC (refd)

*United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 1 MLJ 657; [1999] 2 CLJ 151, FC (refd)

**Legislation referred to**

Rules of Court 2012 O 14, O 14 rr 1, 2

**Appeal from:** *Precious Concrete Sdn Bhd v Yong Kok Yeap* [2024] MLJU 3821 (High Court, Selangor)

*Tang Kim Choong (with Mohammad Shafiee bin Afendi) (KC Tang & Co) for the appellant.*

*Ben Lee Kam Foo (with Atiqah Maisarah bt Azrul Hisham) (Lee Sharen) for the respondent.*

**Azmi Ariffin JCA:**

INTRODUCTION

**[1]** Enclosure 31 dated 19 October 2023 is the appellant/defendant's notice of appeal to this honourable court against the decision of the Shah Alam High in Court Civil Suit No BA-22NCVC-170–05 of 2023 delivered on 19 October 2023 allowing the respondent/plaintiff's application (encl 10) for summary judgment pursuant to O 14 of the Rules of Court 2012 whereby the

learned judicial commissioner ordered as follows:

(1) Bahawa Penghakiman Terus dimasukkan terhadap Defendan di bawah Aturan 14 Kaedah-Kaedah Mahkamah 2012 untuk jumlah tertunggak sebanyak RM3,223,503.56;

(2) Defendan hendaklah membayar jumlah tertunggak sebanyak RM3,223,503.56 kepada Plaintif dalam tempoh tujuh (7) hari dari tarikh penghakiman;

(3) Bahawa Defendan hendaklah membayar faedah kontrak pada kadar 1.5% sebulan ke atas jumlah tertunggak sebanyak RM3,223,503.56, yang dikira secara harian dari 25.1.2022 sehingga pembayaran penuh;

(4) Defendan hendaklah membayar faedah Pasca Penghakiman pada kadar 5% setahun bagi jumlah RM3,223,503.56, yang dikira setiap hari dari tarikh writ ini iaitu 10.5.2023 sehingga pembayaran penuh; dan

(5) Kos sebanyak RM3,000.00 adalah dibayar oleh Defendan kepada Plaintif.

**[2]** For ease of reference, parties will be referred to as the plaintiff and defendant respectively in this judgment.

## THE PLAINTIFF'S VERSION

**[3]** The plaintiff had entered into a contract with MKP Builders Sdn Bhd ('the defendant's company' or 'MKPBSB' interchangeably) on 30 March 2018 ('the said contract'), whereby the plaintiff was appointed by the defendant's company through a quotation to supply ready-mixed concrete for a project known as 'Supply and Delivery of Ready-Mixed Concrete to Damansara Shah Alam Highway (DASH)-Package CA4-Puncak Perdana to Kota Damansara — CH 4983 to CH 9307' ('the said project') subject to the terms of the said contract.

**[4]** The defendant, during the execution of the said contract, was the Director of the defendant's company. Pursuant to the said contract, the defendant had executed a joint and several guarantee dated 30 March 2018 ('the said guarantee') duly witnessed by Nurashikin bt Kamarudin (NRIC No 850224–10–5188) for any payment due and owing by the defendant's company on demand to the plaintiff.

**[5]** At all material times, the plaintiff has satisfactorily satisfied its contractual obligations by supplying the ready-mixed concrete as requested by the defendant's company from March 2018 until April 2019. plaintiff also had issued delivery notes ('the DOs') as proof that the orders had been duly satisfied and delivered by the plaintiff to the defendant's company. The DOs had been duly signed and acknowledged by the authorized personnel of the defendant's company.

**[6]** However, the defendant's company had breached the fundamental terms of the said contract whereby the defendant's company had failed, neglected and/or refused to pay for the orders which had been duly completed and satisfied by the plaintiff between 28 September 2018 until 14 April 2019.

**[7]** Despite the issuance of a reminder dated 20 April 2021 and the issuance of a notice of demand dated 25 January 2022, the defendant's company had failed, neglected and/or refused to pay the outstanding sum due to the plaintiff.

**[8]** Upon initiating a legal action against the defendant's company and the defendant in early 2023, the plaintiff then discovered (through the result of company search on the defendant's company at the Companies Commissions of Malaysia) that the defendant's company had been wound up through a Court order dated 9 February 2022 by Kuala Lumpur High Court vide a Petition No WA-28NCC-495–07 of 2021 filed by Ace Buildings Materials Sdn Bhd dated 27 July 2021.

**[9]** On 3 May 2023, the plaintiff had filed in the proof of debt to the official receiver of the Department of Insolvency, Malaysia that was appointed as the liquidator for the defendant's company.

**[10]** The plaintiff's claims filed herein were supported by contemporaneous documents to prove the plaintiff's claim for the sum of RM3,223,503.56 being the outstanding sum due and payable to the plaintiff.

**[11]** No triable issues nor meritable defence at all were offered by the defendant being the guarantor and principal of the said guarantee to disprove the outstanding sum of RM3,223,503.56 due and payable (which is jointly and severally liable to be paid by the defendant to plaintiff) due to the breach committed by the defendant's company against the said contract.

THE DEFENDANT'S VERSION

**[12]** MKP Builders Sdn Bhd appointed the plaintiff to supply concrete by way of a letter dated 20 January 2017.

**[13]** MKP Builders Sdn Bhd was unlawfully terminated by the main contractor on 15 April 2019.

**[14]** After three years, the plaintiff issued a letter of demand dated 25 January 2022 alleging that MKP Builders Sdn Bhd had failed to pay RM3,223,503.56 to the plaintiff.

**[15]** MKP Builders Sdn Bhd did not have adequate time to respond to refute the demand because MKP Builders Sdn Bhd was wound up on 9 February 2022 (which was about 14 days after the letter of demand).

**[16]** The plaintiff did not establish their claim against MKP Builders Sdn Bhd which was the contracting party.

**[17]** The plaintiff cannot in law, pursue against a guarantor where it has not proven its claim against the company, namely MKP Builders Sdn Bhd.

**[18]** The plaintiff cannot enforce a claim for alleged goods sold and delivered premise on an alleged guarantee agreement.

**[19]** The plaintiff does not have a cause of action against the defendant for the sale and supply of goods as there was no contractual nexus between the plaintiff and the defendant.

**[20]** The plaintiff's cause of action against the defendant for an alleged breach of a guarantee was pre-mature given that there was no liability established against MKP Builders Sdn Bhd.

THE RELEVANT PROVISION OF LAW

(a) O 14 r 1 of the Rules of Court 2012 provides that:

> Application by plaintiff for summary judgment (O 14, r 1)
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> (1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part thereof except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.

(b) O 14 r 2 of the Rules of Court 2012 provides that:

> Manner in which application under rule 1 shall be made (O 14 r 2)
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> (1) An application under rule 1 must be supported by an affidavit in Form 13 verifying the facts on which the claim, or the part of a claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of damages claimed.
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> (2) Unless the Court otherwise directs, an affidavit for the purposes of this rule may contain statements of information or belief with the sources and grounds thereof.
>
> (3) The notice of application, a copy of the affidavit in support and of any

exhibits referred to therein must be served on the defendant within fourteen days from the date of receipt of the sealed notice of application by the applicant.

(4) Order 32, rule 13(2) shall apply mutatis mutandis to all affidavits in respect of an application under this rule.

## PRINCIPLES OF LAW

**[21]** In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, the Supreme Court speaking through judge Mohamed Azmi SCJ (as he then was) held as follows:

> In our view, basic to the application of all those legal propositions, is the requirement under O 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. On the treatment of conflict of evidence on affidavits, Lord Diplock speaking in the Privy Council on *Eng Mee Yong & Ors v Letchumanan* had this to say at p 217:
>
> > Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.
>
> Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a judge has to decide a case or matter on affidavit evidence. Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit.
>
> Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue. Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O 14. if the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand' (see *Cow v Casey* and *European Asian Bank AG v Punjab & Sind Bank* at p 516).

**[22]** In *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300, the Federal Court held as follows:

> We think it appropriate to remind ourselves once again that in every application under O 14 the first considerations are (1) whether the case comes within the order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O 14. For the purposes of an application under O 14 the preliminary requirements are:
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> (i) the defendant must have entered an appearance;
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> (ii) the statement of claim must have been served on the defendant; and
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> (iii) the affidavit in support of the application must comply with the requirements of r 2 of the O 14.
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> It is to be observed that a case is not within O 14: (a) where no statement of claim has been served on the defendant; (b) where the indorsement on the writ includes a claim or claims outside the scope of O 14 as coming within r 1(2); (c) where the affidavit in support of the application is defective, eg in omitting to state the deponent's belief that there is no defence to the claim or part to which the application relates: (d) where the application is made in an action against the Government (O 73 r 5(1)).
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> If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If, however, these considerations are satisfied, the plaintiff will have established a prima facie case and he became entitled to judgment. The burden then shifts to the defendant to satisfy the court why judgment should not be given against him (see O 14 rr 3 and 4(1)).

**[23]** In *United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 1 MLJ 657; [1999] 2 CLJ 151, the Federal Court held as follows:

> ... If the defendant could not point to a specific issue which ought to be tried, but nevertheless satisfied the court that there were circumstances that ought to be investigated, then the words 'there ought for some reason to be a trial would be invoked.

**[24]** In the case of *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685 the Federal Court had stated the following at p 689:

> [5] Quite clearly, the Court of Appeal has put the burden on the plaintiff to prove his case in an O 14 application. With respect, that cannot be the correct proposition of law. In an application under O14, the burden is on the plaintiff to establish the following conditions: that the defendant must have entered appearance; that the statement of claim must have been served on the defendant; that the affidavit in support must comply with r 2 of O 14 in that it must verify the facts on which the claim is based and must state the deponent's belief that there is no defence to the claim (see *Supreme Leasing Sdn Bhd v Dior Enterprises & Ors* [1990] 2 MLJ 36).

Once those conditions are fulfilled, the burden then shifts to the defendant to raise triable issues. The law on this is trite ...

## DECISION OF THE HIGH COURT

**[25]** The learned judicial commissioner in her grounds of judgment held among others as follows:

[10] Menurut Kontrak tersebut, defendan telah melaksanakan jaminan bersama dan berasingan bertarikh 30 Mac 2018 disaksikan oleh Nurashikin bt Kamarudin (No K/P: 850224–10–5188), iaitu kakitangan defendan sendiri.

[11] Terma-terma penting dalam jaminan tersebut, antara lain adalah seperti berikut:

(a) merujuk kepada klausa 1 jaminan tersebut, defendan menandatangan untuk menjamin secara bersama dan berasingan dan berjanji untuk membayar semua wang yang dituntut, faedah dan liabiliti berserta faedah yang terhutang oleh MKPBSB kepada plaintif yang terhasil daripada Kontrak tersebut; dan

(b) merujuk kepada klausa 4 jaminan tersebut di mana apa-apa pernyataan hutang secara bertulis yang ditandatangani oleh mana-mana pegawai yang diberi kuasa oleh Plaintif hendaklah menjadi bukti yang mengikat dan konklusif terhadap defendan mengenai hutang kepada plaintif.

[12] Defendan dalam pembelaannya telah menafikan bahawa beliau telah menandatangani jaminan tersebut dan menyatakan bahawa dokumen jaminan telah dibawa keluar dari pejabatnya tanpa pengetahuannya.

[13] Jaminan tersebut ditandatangani oleh defendan sendiri, disaksikan oleh kakitangannya sendiri dan oleh itu, adalah sah dan boleh dikuatkuasakan.

[14] Tidak pernah berlaku pertikaian mengenai kontrak pembekalan utama (*main supply contract*) dan borang kredit yang telah ditandatangani oleh defendan sendiri. Oleh itu, tiada pertikaian mengenai defendan yang melaksanakan jaminan.

[15] Tidak pernah timbul isu pemalsuan (*forgery*) kerana defendan sendiri mengaku bahawa dia telah menandatanganinya. Adalah tidak logik untuk mengatakan bahawa defendan menandatangani jaminan tetapi tidak bersetuju dengannya.

[16] Oleh itu, jaminan tersebut adalah mengikat secara sah dan defendan secara bersama dan berasingan bertanggungjawab berdasarkan dokumen-dokumen yang jelas ke atas jumlah tertunggak sebanyak RM3,223,503.56 yang perlu dibayar oleh plaintif berdasarkan jaminan tersebut yang ditandatangani oleh defendan sendiri.

[17] Plaintif telah melalui peguamcaranya, Tetuan Gan & Zul telah menghantar notis tuntutan bertarikh 4 Mac 2022 kepada defendan melalui Pos Berdaftar AR dan Pos Berdaftar di mana plaintif telah menuntut defendan untuk membayar jumlah tertunggak yang terhutang dan perlu dibayar berjumlah RM3,223,503.56 kepada plaintif sebagai penjamin dan prinsipal kontrak tersebut.

[18] Writ dan pernyataan tuntutan bertarikh 10 Mei 2023 telah difailkan oleh

plaintif dan berjaya disampaikan kepada defendan melalui Pos Berdaftar AR pada 19 Mei 2023.

[19] Defendan juga telah memfailkan pembelaan bertarikh 12 Jun 2023 dan berjaya disampaikan kepada peguamcara plaintif pada 14 Jun 2023.

[20] Defendan telah melanggar klausa 4 jaminan tersebut, di mana defendan telah gagal menjamin dan membayar semua wang yang dituntut, faedah dan liabiliti berserta faedah yang terhutang oleh MKPBSB kepada plaintif yang terhasil daripada kontrak tersebut.

[25] Mahkamah juga mendapati bahawa tiada isu untuk dibicarakan. Ini adalah kes yang sangat jelas di mana syarikat defendan adalah berhutang kepada plaintif. Defendan sendiri telah menjadi penjamin kepada semua liabiliti syarikat defendan. Oleh itu apabila syarikat defendan telah digulungkan, defendan sendiri adalah bertanggungjawab untuk melunaskan hutang tersebut.

[26] Hutang syarikat defendan kepada plaintif adalah sangat jelas dan tidak boleh dipertikaikan. Walaupun defendan sendiri mempertikaikan bahawa beliau tidak memberikan jaminan tersebut, tetap ini tidak dibuktikan.

[27] Oleh itu, mahkamah membenarkan permohonan plaintif untuk memasukkan penghakiman terus di bawah A 14 Kaedah-Kaedah Mahkamah 2012.

## OUR DECISION

**[26]** Having appraised ourselves of all the above established and entrenched legal principles and the relevant provision of the law, the appeal records, written and oral submissions of parties, the grounds of judgment by the learned judicial commissioner, we unanimously found no misdirection on the part of the learned judicial commissioner to warrant this honourable court to exercise its powers to interfere with the findings of the court below. We shall now give our reasons.

**[27]** The defendant had executed a joint and several guarantee dated 30 March 2018 duly witnessed by Nurashikin bt Kamarudin which the details and signature of the witness were written on the said guarantee.

**[28]** The salient terms of the said guarantee, inter alia, are as follows:

(a) in reference to cl 1 of the said guarantee, defendant undersigned to be jointly and severally guaranteed and undertake to pay on demand all monies, interest and liabilities together with interest owing by MKP Builders Sdn Bhd to the plaintiff arising from the said contract; and

(b) in reference to cl 4 of the said guarantee whereby any statement of indebtness in writing signed by any of the plaintiff's authorised officer shall be binding and conclusive proof against the defendant of the indebtness to the plaintiff.

**[29]** Thus, it is clear that there existed/was a contractual relationship between the plaintiff and the defendant's company.

**[30]** In pursuant to the breach of contract by MKP Builders Sdn Bhd, the defendant is liable as the guarantor and also principal of the said contract to pay the outstanding sum due and payable to the plaintiff.

**[31]** The defendant had never denied the existence of the said guarantee which he understood the content and effect of it and proceeded to sign the guarantee himself which binds him to be jointly and severally liable as the guarantor and principal for the said contract to pay on demand all monies, interest and liabilities together with the interest owing by MKP Builders Sdn Bhd to the plaintiff which amounted to RM3,223,503.56. This, therefore creates the obligation on the defendant.

**[32]** The triable issue raised on the execution of the guarantee has no merit where the defendant confirms he signed it and there was no allegation of fraud or forgery.

**[33]** Reference is made to the case of *Andrew Lee Siew Ling v United Overseas Bank (M) Bhd* [2013] 1 MLJ 449, where Zulkifli CJ (Malaya) delivering the judgment of the Federal Court has ruled as follows at p 460:

> [23] It is our considered view that in the present case the appellant, being a person who has given a guarantee and more importantly an indemnity, is primarily liable for losses which the principal borrower could not have been made liable. His liability is not dependent or secondary to the liability of the principal borrower. He is a principal debtor himself ...

**[34]** The defendant had never denied that the plaintiff had satisfied its contractual obligation under the contract to supply the ready-mixed concrete to MKP Builders Sdn Bhd which was strongly supported by the issuance of delivery notes between 28 September 2018 until 14 April 2019 that duly signed and acknowledged by the authorized personnel of the defendant's company (see exh 'NSH2' of the plaintiff's affidavit in support in encl 6 pp 356–540 Volume 4–9, encl 7 pp 541–740 Volume 5-9, encl 8 pp 741–940 Volume 6–9 and encl 9 pp 941–1037 of the record of appeal.

**[35]** The plaintiff had exhausted all legal remedy against MKP Builders Sdn Bhd before commencing the main suit against the defendant.

**[36]** Hence, we find no merits in the appeal which is dismissed with costs of RM10,000 to the plaintiff subject to allocatur fees.

*Appeal dismissed with costs of RM10,000 to plaintiff subject to allocatur fees.*

Reported by Dzulqarnain Ab Fatar